



June 27, 2005

Federal Trade Commission  
Office of the Secretary, Room H-159 (Annex Z)  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Attention: CAN-SPAM Act Rulemaking, Project No. R411008

Re: Notice of Proposed Rulemaking, Definitions, Implementation, and Reporting  
Requirements under the CAN-SPAM Act, 70 FR 25426 (May 12, 2005)

Dear Sir or Madam:

America's Community Bankers ("ACB")<sup>1</sup> welcomes the opportunity to comment on the notice of proposed rulemaking and request for public comment<sup>2</sup> regarding proposed rules issued by the Federal Trade Commission (the "Commission") that would further implement the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM").<sup>3</sup>

Specifically, the Commission is proposing regulations under its discretionary rulemaking authority to:

- Define the term "person" to include "an individual, group, unincorporated association, limited or general partnership, corporation or other business entity";
- Further define "sender" to address scenarios where a single e-mail message contains advertisements from multiple entities;
- Clarify that Post Office boxes and private mail boxes established pursuant to U.S. Postal Service regulations are "valid physical postal addresses" under CAN-SPAM;
- Shorten from ten to three business days the time period within which a sender has to honor a recipient's opt-out request; and
- Clarify that a recipient may not be required to pay a fee or provide information other than his or her email address and opt-out preferences, or take any other steps other than sending a reply email message or visiting a single Internet website to submit a valid opt-out request.

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<sup>1</sup> America's Community Bankers is the member driven national trade association representing community banks that pursue progressive, entrepreneurial and service-oriented strategies to benefit their customers and communities. To learn more about ACB, visit [www.AmericasCommunityBankers.com](http://www.AmericasCommunityBankers.com).

<sup>2</sup> 70 Fed. Reg. 25426 (May 12, 2005).

<sup>3</sup> 15 U.S.C. §§ 7701-7713.

## **ACB Position**

ACB supports the efforts of the Commission to provide greater clarity with respect to the regulation of electronic communications. At the same time, ACB seeks to reduce unnecessary regulatory burden whenever possible, and believes that regulations implementing CAN-SPAM must not unduly restrict legitimate email communications between financial institutions and their customers and other constituents. While ACB believes that the proposed rule offers some useful guidance on certain aspects of CAN-SPAM, we believe the final rule should incorporate some important modifications.

ACB supports the proposed definition of “valid physical postal address” because it recognizes that, for many senders of email, a street address is not the primary mailing address.

We strongly urge the Commission not to reduce the opt-out response period from ten to three business days, as proposed. The Commission states that, in many cases, opt-outs can be processed instantaneously. There are a number of important steps that follow receipt of an opt-out request, however. The sender must determine the scope of the request to ensure that a recipient’s desire to receive other types or categories of email also is honored. The sender must update its data records to affect the opt-out request, but also to ensure that the scope of the opt-out is accurate. As well, and given the Commission’s proposed definition of “person,” opt-out requests submitted by one recipient within a company or organization must be compared against the email preferences of other recipients within the same company or organization as part of an ongoing business or customer relationship. As well, the implementation of CAN-SPAM still is relatively new and we believe that additional time for study of its impact is necessary before making such a change. For all these reasons, ACB believes the current ten-day response period is appropriate and requests that the Commission retain it in any final rule.

Separately, ACB believes that the Commission should confirm in its final rule that opt-out requests expire for the recipient five years following receipt by the sender. This will help ensure that data is accurate, particularly as business relationships change and evolve over time.

ACB appreciates the Commission’s effort to address multiple senders of emails with proposed criteria for determining the “sender” when the products and services of multiple entities are included in a single email message. Under the proposed rule, when more than one person’s products or services are advertised or promoted in a single email, each such person would be deemed a sender, except that if only one of the senders meets the following criteria, that person would be the “sender”:

- The person controls the content of such message;
- The person determines the email addresses to which such message is sent; or
- The person is identified in the “from” line as the sender of the message.

ACB believes, however, that additional clarification is necessary with respect to “control” of the message. While a single sender may be the lead in an email message, all of the senders will control their portion of the content of the message. We believe the Commission should further

clarify “control” to mean the sender that controls the final presentation of an email message, but that control does not include a sender that controls their portion of the content of the message.

While the Commission has not proposed any modifications to the definition “transactional or relationship message,” the proposal includes a discussion of the comments received on the issue. In response, the Commission has requested comments on the use of third parties to disseminate email messages. ACB believes that the Commission should provide a “safe harbor” for senders that use third parties to disseminate email messages. Today, many companies use third parties to disseminate email messages that may be either commercial or transactional or relationship. Smaller companies rely on third party expertise and resources to help ensure compliance with applicable rules under CAN-SPAM. The use of a third party should not alter the status of an electronic communications, and ACB urges the Commission to provide this additional clarification in the final rule.

## **Conclusion**

ACB appreciates the opportunity to comment on this important matter and we look forward to working with the Commission to finalize its rules in the important area of electronic business communications. Should you have any questions or need additional information please contact the undersigned at (202) 857-3121 or via email at [cbahin@acbankers.org](mailto:cbahin@acbankers.org), or Michael Briggs at (202) 857-3122 or via email at [mbriggs@acbankers.org](mailto:mbriggs@acbankers.org).

Sincerely,

Charlotte M. Bahin  
Senior Vice President  
Regulatory Affairs